

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

TERRANCE JOHN DUMPHY,

Petitioner,

v.  
CDC, et al.,

Respondents.

Civil No. 08cv1703-L (PCL)

**ORDER DISMISSING CASE  
WITHOUT PREJUDICE**

Petitioner, a state prisoner proceeding pro se, has filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, but has failed to pay the \$5.00 filing fee and has failed to move to proceed in forma pauperis. Because this Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or qualified to proceed in forma pauperis, the Court **DISMISSES** the case without prejudice. See Rule 3(a), 28 U.S.C. foll. § 2254. If Petitioner wishes to proceed with this case, he must submit, **no later than November 22, 2008**, a copy of this Order with the \$5.00 fee or with adequate proof of his inability to pay the fee.

The Petition is also subject to dismissal because Petitioner has failed to name a proper respondent and has failed to allege exhaustion of state court remedies. On federal habeas, a state prisoner must name the state officer having custody of him as the respondent. Ortiz-Sandoval v. Gomez, 81 F.3d 891, 894 (9th Cir. 1996). -“Typically, that person is the warden of the facility in which the petitioner is incarcerated.” Id. Federal courts lack personal jurisdiction where the petitioner fails to name a proper respondent. See id.

1       The warden is the typical respondent. However, “the rules following section 2254 do not  
 2 specify the warden.” Id. “[T]he ‘state officer having custody’ may be ‘either the warden of the  
 3 institution in which the petitioner is incarcerated . . . or the chief officer in charge of state penal  
 4 institutions.’” Id. (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory committee’s note). If “a  
 5 petitioner is in custody due to the state action he [or she] is challenging, ‘[t]he named respondent  
 6 shall be the state officer who has official custody of the petitioner (for example, the warden of  
 7 the prison).’” Id. (quoting Rule 2, 28 U.S.C. foll. § 2254 advisory committee’s note).

8       A long standing rule in the Ninth Circuit holds “that a petitioner may not seek [a writ of]  
 9 habeas corpus against the State under . . . [whose] authority . . . the petitioner is in custody. The  
 10 actual person who is [the] custodian [of the petitioner] must be the respondent.” Ashley v.  
 11 Washington, 394 F.2d 125, 126 (9th Cir. 1968). This requirement exists because a writ of  
 12 habeas corpus acts upon the custodian of the state prisoner, the person who will produce “the  
 13 body” if directed to do so by the Court. “Both the warden of a California prison and the Director  
 14 of Corrections for California have the power to produce the prisoner.” Ortiz-Sandoval, 81 F.3d  
 15 at 895.

16       Here, Petitioner has incorrectly named “CDC,” “USCD” and “SD County” as  
 17 Respondents. If Petitioner is referring to the California Department of Corrections and  
 18 Rehabilitation with his reference to “CDC,” that is insufficient. In order for this Court to  
 19 entertain the Petition filed in this action, Petitioner must name the warden in charge of the state  
 20 correctional facility in which Petitioner is presently confined or the Director of the California  
 21 Department of Corrections and Rehabilitation, not the Department itself. Brittingham v. United  
 22 States, 982 F.2d 378, 379 (9th Cir. 1992) (per curiam).

23       Further, habeas petitioners who wish to challenge either their state court conviction or the  
 24 length of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C.  
 25 § 2254(b), (c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust state judicial  
 26 remedies, a California state prisoner must present the California Supreme Court with a fair  
 27 opportunity to rule on the merits of every issue raised in his or her federal habeas petition. 28  
 28 U.S.C. § 2254(b), (c); Granberry, 481 U.S. at 133-34. Moreover, to properly exhaust state court

1 remedies a petitioner must allege, in state court, how one or more of his or her federal rights  
 2 have been violated. The Supreme Court in Duncan v. Henry, 513 U.S. 364 (1995) reasoned:  
 3 “If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal  
 4 rights, they must surely be alerted to the fact that the prisoners are asserting claims under the  
 5 United States Constitution.” Id. at 365-66 (emphasis added). For example, “[i]f a habeas  
 6 petitioner wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the  
 7 due process of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not only  
 8 in federal court, but in state court.” Id. at 366 (emphasis added).

9 Here, Petitioner has not indicated that he has exhausted state judicial remedies. Nowhere  
 10 in the Petition does Petitioner allege that he raised his claims in the California Supreme Court.  
 11 If Petitioner has raised his claims in the California Supreme Court he must so specify. The  
 12 burden of pleading that a claim has been exhausted lies with the petitioner. Cartwright v. Cupp,  
 13 650 F.2d 1103, 1104 (9th Cir. 1981).

14 Further, the Court cautions Petitioner that under the Antiterrorism and Effective Death  
 15 Penalty Act of 1996 (AEDPA) a one-year period of limitation shall apply to a petition for a writ  
 16 of habeas corpus by a person in custody pursuant to the judgment of a State court. The  
 17 limitation period shall run from the latest of:

18 (A) the date on which the judgment became final by the  
 19 conclusion of direct review or the expiration of the time for seeking  
 such review;

20 (B) the date on which the impediment to filing an application  
 21 created by State action in violation of the Constitution or laws of the  
 22 United States is removed, if the applicant was prevented from filing  
 by such State action;

23 (C) the date on which the constitutional right asserted was  
 24 initially recognized by the Supreme Court, if the right has been  
 newly recognized by the Supreme Court and made retroactively  
 applicable to cases on collateral review; or

25 (D) the date on which the factual predicate of the claim or  
 26 claims presented could have been discovered through the exercise  
 of due diligence.

27 28 U.S.C.A. § 2244(d)(1)(A)-(D) (West 2006).

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1 The statute of limitations does not run while a properly filed state habeas corpus petition  
2 is pending. 28 U.S.C. § 2244(d)(2); see Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999).  
3 But see Artuz v. Bennett, 531 U.S. 4, 8 (2000) (holding that “an application is ‘properly filed’  
4 when its delivery and acceptance [by the appropriate court officer for placement into the record]  
5 are in compliance with the applicable laws and rules governing filings.”). However, absent some  
6 other basis for tolling, the statute of limitations does run while a federal habeas petition is  
7 pending. Duncan v. Walker, 533 U.S. 167, 181-82 (2001).

8 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a  
9 habeas petition “[i]f it plainly appears from the face of the petition and any attached exhibits that  
10 the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll. § 2254.  
11 Here, it appears plain from the Petition that Petitioner is not presently entitled to federal habeas  
12 relief because he has failed to name a proper respondent and has not alleged exhaustion of state  
13 court remedies.

14 The Court also notes that Petitioner may be attempting to assert claims regarding the  
15 conditions of his confinement rather than the duration or legality of his confinement. Challenges  
16 to the fact or duration of confinement are properly brought by petition for a writ of habeas  
17 corpus, pursuant to 28 U.S.C. § 2254; challenges to conditions of confinement are brought  
18 pursuant to the Civil Rights Act, 42 U.S.C. § 1983. See Preiser, 411 U.S. at 488-500. When a  
19 state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief  
20 he seeks is a determination that he is entitled to immediate release or a speedier release from that  
21 imprisonment, his sole federal remedy is a writ of habeas corpus. Id. at 500. On the other hand,  
22 a § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge  
23 to the conditions of his prison life, but not to the fact or length of his custody. Id. at 499;  
24 McIntosh v. United States Parole Comm'n, 115 F.3d 809, 811-12 (10th Cir. 1997).

## CONCLUSION

26 Based on the foregoing, the Court **DISMISSES** this action without prejudice because  
27 Petitioner has failed to satisfy the filing fee requirement, has failed to name a proper respondent  
28 and has failed to allege exhaustion of state judicial remedies. To have this case reopened,

1 Petitioner must satisfy the filing fee requirement and file a First Amended Petition that cures the  
2 pleading deficiencies set forth above no later than **November 22, 2008**.

3 Further, Petitioner is advised that if he has not alleged exhaustion of his state court  
4 remedies before **November 22, 2008**, and he still wishes to pursue his claims in a habeas  
5 petition, he will have to start over by filing a completely new habeas petition in this Court. See  
6 In re Turner, 101 F.3d 1323 (9th Cir. 1997). The Clerk of Court shall send a blank Southern  
7 District of California In Forma Pauperis Application, a blank Southern District of California  
8 amended petition form, and a blank Southern District of California § 1983 Complaint form to  
9 Petitioner along with a copy of this Order.

10 **IT IS SO ORDERED.**

11 **DATED: September 23, 2008**

12   
13 **M. James Lorenz**  
United States District Court Judge

14 CC: ALL PARTIES  
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